IN THE
INDIANA SUPREME COURT

No. _____

(Court of Appeals No. 49A02-0007-CV-433)

MEGHAN RENE, *et al.*,	)	
	)	APPEAL FROM THE MARION
Appellants (Plaintiffs Below),	)	SUPERIOR COURT, ROOM NO. 12
	)	
v.	)	Cause No. 49D12-9805-CP-370
	)	
DR. SUELLEN REED, *et al.*,	)	HONORABLE SUSAN MACEY
	)	THOMPSON, JUDGE
Appellee (Defendant Below).	)	

REPLY BRIEF IN SUPPORT OF PETITION TO TRANSFER

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ARGUMENT

I. Introduction

The decision of the Court of Appeals erroneously established two new extremely important and far-reaching questions of law. First, the Court held that due process was not violated despite the uncontested evidence that in May of 1999 almost 50% of students with learning disabilities had not had sufficient curriculum preparation to take the graduation qualifying examination ("GQE") and despite the uncontested evidence that non-disabled students were required by Indiana law to have 13 years of preparation to learn the building block material necessary to master the proficiencies tested on the GQE and disabled students were required to have only 3 years. Secondly, the Court held that despite the fact that federal law specifically contemplates that there be appropriate accommodations in state wide assessments, 20 U.S.C. § 1412(a)(17), it was not a violation of federal law for the State to deny to disabled students testing accommodations on the GQE even though every other single test ever taken by the student was taken with those accommodations. As a result of this, in the class of 2000 alone, more than 1,100 children did not graduate. (R. 336). This is obviously "a case of great public importance that has not been, but should be, decided by the Supreme Court." Rule 56(H)(4), Indiana Rules of Appellate Procedure.

II. The Court of Appeals decision is erroneous as a matter of law and the students are not asking that any evidence be reweighed

It is undisputed that the trial court found that once students flunked the GQE in their sophomore years they were given remediation opportunities. (R. 1375). However, it is also undisputed that prior to the advent of the GQE there was absolutely no legal requirement that disabled students be taught the building block material necessary to ultimately obtain mastery of the material tested on the GQE. This, despite the fact that Indiana law required that non-disabled students begin this realignment process in 1987. The failure to realign the disabled students'

curriculum was so profound and so pervasive that the Legislative Services Agency found in May of 1999, almost two school years after the GQE was first given in 1998, that only "51% of the 10th and 11th grade students with learning disabilities who took the GQE had sufficient curriculum preparation." (R. 911). Even as this case went to hearing before the trial court in the late spring of 2000, special education directors indicated that they had still not realigned their curriculum to teach what was tested on the GQE. (R. 106, 212).

Thus, regardless of any remediation offered after the test was flunked, it is uncontested, that many of the students were never exposed to a curriculum which was geared to teach them the building block material which they would need to master the test. It is also uncontested that non-disabled students were exposed to this material from the first day that they attended kindergarten. Non-disabled students were given an entire academic career of careful grooming to assure that they would have every opportunity to pass the GQE. Disabled students were given 3 years and during this time they were not even assured of being taught a curriculum which had been realigned to teach what was tested on the GQE. There is no need to reweigh any evidence to recognize that this is a stark and obvious due process violation. *Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Crump v. Gilmer Independent School District*, 797 F.Supp. 552 (E.D.Tex. 1992).

The State argues that the three years notice that disabled students were given from the time that the test was first given in 1997 until the graduation of the class of 2000 was sufficient, citing *Board of Education of Northport-East Northport Union Free School District v. Ambach*, 458 N.Y.S.2d 680 (App.Div. 1982), *aff'd*, 457 N.E.2d 775 (N.Y. 1983), *cert. den.*, 465 U.S. 1101 (1984). It is true that in *Ambach* the court held that three years prior notice was constitutionally adequate procedural due process. But the court in *Ambach* did not face the situation here where the students'

curriculum was not properly aligned throughout their education careers so as to actually expose the students to the information necessary, ultimately, to be able to pass the GQE. No matter how much remediation a student has, if she or he has not been exposed to and learned the basic building block material, passing the GQE will be an unattainable goal.

For this reason, the opportunity given for remediation is simply not an effective remedy for the due process violation. If the GQE is not a fair test of what has been taught to the students throughout their educational lifetimes, the proper remedy is to prohibit the test from being used until it is a fair test of what the students have been taught. *Debra P.*, 644 F.2d at 408. Nor is the fact that a student can receive a waiver of the GQE requirement if the student can otherwise demonstrate that he or she has mastered the proficiencies tested on the examination a remedy for the due process violation. The disabled students have not been given an adequate opportunity to master the proficiencies. To them, the waiver is illusory.

For the reasons outlined in the Petition to Transfer, the Court of Appeals determination, in the first reported decision in the United States, that the failure of the State to honor certain accommodations in the GQE is lawful, is also erroneous and must be reviewed by this Court.

III. Conclusion

The GQE, and its attendant due process and statutory violations, has worked great hardship and great injustice on a large number of disabled students who we should be lauding rather than punishing. Transfer should be granted to remedy this.

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 1,000 words in accordance with Appellate Rule 44.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following person(s) on this 20th day of August, 2001, by first class U.S. Postage, pre-paid.

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